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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 DIRECT LIST LLC, a North Carolina
11 Limited Liability Company; and
ERAN SALU, an individual,

12 Plaintiff,

13 v.

14 VISTAGE INTERNATIONAL, INC.,
a Delaware Corporation; PHIL
15 KESSLER; LAUREN KESSLER;
DIANA OWENS; EDETTE
16 HERRON; and DOES 1 through 10,
inclusive,

17 Defendant.

CASE NO. 15cv2025-WQH-JLB
ORDER

18 HAYES, Judge:

19 The matter before the Court is the Motion for Summary Judgment, or in the
20 Alternative Dismissal, of Plaintiffs' Fraud and Cal. Bus. & Prof. Code § 17200 Claims
21 pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 56 filed by Defendant Vistage
22 International, Inc ("Vistage"). (ECF No. 47).

23 **I. Background**

24 On September 11, 2015, Plaintiffs Direct List LLC ("Direct List") and Eran Salu
25 ("Salu") commenced this action by filing the Complaint alleging four causes of action:
26 (1) fraud, (2) breach of fiduciary duty, (3) misappropriation of trade secrets in violation
27 of Cal. Civil Code § 3426 *et seq.*, and (4) unfair business practices in violation of Cal.
28 Bus. & Prof. Code § 17200 *et seq.*, California's unfair competition law ("UCL"). (ECF

No. 1 at 14-17). The fraud claim was brought only by Salu. *Id.* at 14. The UCL claim was brought by Salu and Direct List. *Id.* at 17. On February 8, 2016, the Court issued an order granting Vistage’s Motion to Dismiss Plaintiffs’ claim for breach of fiduciary duty and denying Vistage’s Motion to Dismiss Plaintiffs’ claim for fraud. (ECF No. 20 at 13).

On July 22, 2016, Vistage filed the Motion for Summary Judgment, or in the Alternative Dismissal, of Plaintiffs’ Fraud and Cal. Bus. & Prof. Code § 17200 Claims pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 56. (ECF No. 47). Vistage contends that the Court lacks subject matter jurisdiction over the fraud claim because Salu does not have standing under Article III of the U.S. Constitution, and that the Court lacks subject matter jurisdiction over the UCL claim because neither Salu nor Direct List have Article III standing. In the alternative, Vistage contends that summary judgment is warranted on the fraud claim because Salu has suffered no damages. Vistage contends that summary judgment is warranted on the UCL claim because Salu and Direct List have not suffered a cognizable injury under the UCL, and the remedies available under the UCL are inapplicable to this matter.

On August 15, 2016, Plaintiffs filed a response in opposition. (ECF No. 53). On August 22, 2016, Vistage filed a reply. (ECF No. 54).

II. Article III Standing

A. Allegations of the Complaint

Vistage is an organization that offers chief executive officers a “confidential, trusted forum in which CEOs may safely discuss their most sensitive and private business affairs with fellow CEOs, led and overseen by the CEO Group Chair.” (ECF No. 1 at ¶ 2). “Plaintiff Direct List LLC is a direct marketing company with over 30 years of experience in lead generation, email marketing, direct mail, and data processing[.]” *Id.* at ¶ 23. Plaintiff Eran Salu (“Salu”) created Direct List LLC, and the “sole owner/member” of Direct List “is JAL Equity Corporation, which is a Nevada corporation[.]” *Id.* at ¶¶ 7, 12.

1 Plaintiffs allege that Salu joined Vistage in or around 2007, and after moving to
2 San Diego, California, Salu “joined a [Vistage] group chaired by Defendant Phil
3 Kessler . . .” *Id.* at ¶¶ 30, 34. Plaintiffs allege that “Salu shared highly confidential and
4 sensitive business information and trade secrets about Direct List with Mr. Kessler[,]”
5 and that in 2012 “Direct List began to provide direct marketing to Vistage.” *Id.* at ¶¶
6 36, 43. Plaintiffs allege that “[t]he work for Vistage was performed by Direct List’s
7 Direct Marketing Group team, which” included Defendant Edette Herron (“Herron”).
8 *Id.* at ¶ 46.

9 Plaintiffs allege that “[i]n or around February 2015, Mr. Salu informed Mr.
10 Kessler that he would be moving to Florida in 3 months, and that he could therefore no
11 longer participate in Mr. Kessler’s Vistage Group.” *Id.* at ¶ 52. Plaintiffs allege that
12 in May 2015, after Salu had left California, all of the Direct List employees left the
13 company. *Id.* at ¶¶ 54-57. Plaintiffs allege that Salu then learned that Herron, a former
14 Direct List employee, worked at AVS Leads and that Kessler’s daughter was the
15 general manager. *Id.* at ¶¶ 58-59. Plaintiffs allege that Kessler subsequently confirmed
16 that his daughter worked for AVS Leads and “conceded that he had introduced his
17 daughter and [] Herron to facilitate the formation of a business intended to directly
18 compete with Direct List.” *Id.* at ¶ 61. Plaintiffs allege that “AVS Leads currently
19 employees [sic] all five of the ex-employees of Direct List’s Direct Marketing Group.”
20 *Id.* at ¶ 71.

21 Plaintiffs allege that “[t]he formation and success of AVS Leads was made
22 possible solely through the misappropriation of Direct List’s confidential business
23 materials, which was orchestrated by Mr. Kessler in reliance on confidential
24 information he had learned from Mr. Salu in his role as Vistage Chair, acting as agent
25 for Vistage International.” *Id.* at ¶ 75. Plaintiffs allege that “Kessler was acting as the
26 agent of Vistage International” when Salu shared Direct List’s confidential information
27 with his Vistage group, and Vistage “authorized” and “ratified” Kessler’s actions. *Id.*
28 at ¶ 35. Plaintiffs allege that “[w]hen Mr. Salu became aware of this theft of his

1 confidential information, he promptly contacted Vistage . . . only to be told that it was
2 not their problem or concern.” *Id.* at ¶ 9. Plaintiffs allege that as the result of this
3 “conduct . . . Direct Leads has been deprived of the vast majority of its clients, and over
4 half of its profits.” *Id.* at ¶ 76. Plaintiffs allege that “Salu has suffered damages in the
5 form of substantial loss of business and profits to his company, in the estimated amount
6 of \$3 million.” *Id.* at ¶ 85.

7 **B. Contentions of the Parties**

8 Vistage contends that “JAL Equity is the sole owner of Direct List[,] Salu has
9 never been an employee of Direct List[, and h]e has never received personal income
10 from Direct List.” (ECF No. 47-1 at 13) (citing ECF No. 47-2 at 2-3). Vistage
11 contends that “Salu cannot claim he has standing by stepping into the shoes of JAL
12 Equity.” (ECF No. 47-1 at 20). Vistage contends that while the Complaint alleges \$3
13 million in damages, “[t]hese are Direct List’s damages, not Salu’s damages (and Direct
14 List is not [Salu’s] company).” *Id.* at 11.

15 Vistage contends that the Court lacks subject matter jurisdiction over the fraud
16 claim brought by Salu because Salu has suffered no injury. *Id.* at 21. Vistage contends
17 that “Salu does not allege that he personally suffered any damages in connection with
18 his fraud claim[,]” and that “Salu has suffered no injury in fact.” *Id.* at 18. Vistage
19 contends that Salu also does not have standing to bring the UCL claim. *Id.* at 25.
20 Vistage contends that the “Plaintiffs allege that the Non-Vistage Defendants took the
21 Confidential Information, misused it, formed a competitor called AVS, and operate that
22 competitor to date[,]” but Vistage did not profit from this conduct or cause any harm
23 to Plaintiffs. *Id.* at 28.

24 Plaintiffs contend that Salu has standing to bring the fraud claim because he “is
25 properly asserting an individual claim” for fraud. (ECF No. 53 at 14). Plaintiffs
26 contend that “Vistage’s representations were made to Salu personally, and not to Direct
27 List, and Salu’s reliance was likewise personal.” *Id.* at 15. Plaintiffs contend that “Salu
28 has consistently maintained that he personally suffered damages[,]” and he testified

1 “that at the time of filing this suit, [Salu] believed his personal damages resulting from
 2 the loss of income from Direct List was \$3 million.” *Id.* Plaintiffs contend that
 3 “Vistage’s premise that ‘Salu has personally suffered no damages’ is false” and “[t]he
 4 fact that Salu has suffered damages undermines all of Vistage’s various standing
 5 arguments and claims that he cannot establish the damages element for fraud.” *Id.* at
 6 16.

7 **C. Applicable Law**

8 A litigant must have standing “to challenge the action sought to be adjudicated
 9 in [any] lawsuit” in federal court, and this requirement is imposed by Article III of the
 10 U.S. Constitution. *Valley Forge Christian College v. Americans United*, 454 U.S. 464,
 11 471 (1982). “Standing is an essential, core component of the case or controversy
 12 requirement” of Article III. *San Diego Cty. Gun Rights Comm. v. Reno*, 98 F.3d 1121,
 13 1126 (9th Cir. 1996). The Supreme Court has stated that

14 It is by now well settled that ‘the irreducible constitutional minimum of
 15 standing contains three elements. First, the plaintiff must have suffered an
 16 ‘injury in fact’ – an invasion of a legally protected interest that is (a)
 17 concrete and particularized, and (b) actual or imminent, not conjectural or
 18 hypothetical. Second, there must be a causal connection between the injury
 19 and the conduct complained of . . . Third, it must be likely, as opposed to
 20 merely speculative, that the injury will be redressed by a favorable
 21 decision.

22 *United States v. Hays*, 515 U.S. 737, 742-73 (1995) (quoting *Lujan v. Defenders of*
 23 *Wildlife*, 504 U.S. 555, 560-561 (1992)).

24 In *Lujan*, the Supreme Court stated that “it must be ‘likely,’ as opposed to merely
 25 ‘speculative,’ that the injury will be redressed by a favorable decision.” 504 U.S. at 561
 26 (citation omitted). In a challenge to Article III standing, “[t]he burden of showing that
 27 there is standing rests on the shoulders of the party asserting” that standing is proper in
 28 the case. *Smelt v. Cty. of Orange*, 447 F.3d 673, 682 (9th Cir. 2006). In addition to the
 constitutional requirements for standing under Article III, the Supreme Court has
 identified several prudential standing principles “to which ‘the federal judiciary has also
 adhered.’” *Id.* (citing *Valley Forge*, 454 U.S. at 474). The Court has stated that to
 satisfy these additional requirements, the plaintiff “must assert his own legal rights and

1 interests, and cannot rest his claim to relief on the legal rights or interests of third
 2 parties[.]” the plaintiff’s complaint must “fall within the zone of interests to be
 3 protected or regulated by the statute or constitutional guarantee in question[.]” and
 4 federal courts cannot adjudicate “abstract questions of wide public significance” which
 5 are “most appropriately addressed in the representative branches.” *Valley Forge*, 454
 6 U.S. at 474-75 (citations omitted)

7 Standing is a jurisdictional issue, and federal courts must confront a challenge to
 8 standing before addressing the merits of the case. *See Steel Co v. Citizens for a Better*
 9 *Env’t.*, 523 U.S. 83, 94-95 (1998) (“The requirement that jurisdiction be established as
 10 a threshold matter . . . is ‘inflexible and without exception.’”) (citation omitted).
 11 Challenges to standing “pertain to federal courts’ subject matter jurisdiction, [and] they
 12 are properly raised in a Rule 12(b)(1) motion to dismiss.” *Chandler v. State Farm Mut.*
 13 *Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010). When a litigant fails to establish
 14 Article III standing, “an Article III federal court therefore lacks subject matter
 15 jurisdiction over the suit [and i]n that event, the suit should be dismissed under Rule
 16 12(b)(1).” *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004).

17 “Rule 12(b)(1) jurisdictional attacks can be either facial or factual.” *White v. Lee*,
 18 227 F.3d 1214, 1242 (9th Cir. 2000). “In a facial attack, the challenger asserts that the
 19 allegations contained in a complaint are insufficient on their face to invoke federal
 20 jurisdiction.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).
 21 However, “in a factual attack, the challenger disputes the truth of the allegations that,
 22 by themselves, would otherwise invoke federal jurisdiction.” *Id.* When presented with
 23 a factual attack on Article III standing, the court “may look beyond the complaint to
 24 matters of public record without having to convert the motion into one for summary
 25 judgment.” *White*, 227 F.3d at 1242. To survive a Rule 12(b)(1) challenge to standing,
 26 a plaintiff “need only show that the facts alleged, if proved, would confer standing upon
 27 him.” *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1140 (9th Cir. 2003).

28 **D. Vistage’s Motion to Dismiss Based On Article III Standing**

1 **i. Plaintiff Salu**

2 Vistage challenges Salu’s Article III standing to bring claims for fraud and under
3 the UCL. Salu alleges in the Complaint he “has suffered damages in the form of
4 substantial loss of business and profits to his company, in the estimated amount of \$3
5 million.” (ECF No. 1 at ¶ 85). The Court of Appeals has found that “[e]conomic injury
6 is clearly a sufficient basis for standing.” *San Diego Cty. Gun Rights Comm.*, 98 F.3d
7 at 1130. However, the Complaint states that Direct List is solely owned by JAL Equity,
8 and it is undisputed by the parties that Salu has never been an employee of Direct List.
9 (ECF Nos. 1 at ¶ 12, 54-3 at 2-3).

10 In order to satisfy the Article III injury requirement, Salu must demonstrate that
11 he suffered an injury personal and separate from any alleged injury sustained by Direct
12 List. “[A]t an irreducible minimum,” the Article III injury requirement is satisfied with
13 a showing that the plaintiff “personally has suffered some actual or threatened injury
14 as a result of the putatively illegal conduct of the defendant[.]” *Valley Forge*, 454 U.S.
15 at 472 (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)).

16 Salu bears the burden to demonstrate he has satisfied Article III standing, and he
17 fails to do so on both the fraud and UCL claims.¹ *See Thompson v. McCombe*, 99 F.3d
18 352, 353 (9th Cir. 1996) (holding the “party invoking the federal court’s jurisdiction has
19 the burden of proving the actual existence of subject matter jurisdiction.”). Vistage
20 prevails on its facial attack on Salu’s Article III standing because “the allegations
21 contained in [the] complaint are insufficient on their face to invoke federal jurisdiction.”
22 *Safe Air*, 373 F.3d at 1039. Salu alleges that he “suffered damages in the form of
23 substantial loss of business and profits to his company[.]” (ECF No. 1 at ¶ 85). Absent
24 this statement, the Complaint does not contain allegations that Direct List is Salu’s
25 company. Salu has failed to allege an injury sufficient to satisfy Article III standing on
26 the face of the complaint.

27
28 ¹ While the UCL contains its own standing requirement, plaintiffs in a UCL suit
must still satisfy the constitutional standing requirements of Article III. *Kwikset Corp.*
v. Superior Court, 246 P.3d 877, 885 (Cal. 2011).

Further, Vistage prevails on its factual attack on Salu's Article III standing. After a review of "any evidence, such as affidavits and testimony," the Court finds that Salu has not suffered any injury separate from Direct List. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988). Based on a review of the parties' filings and the Record,² the Court determines that Salu has not demonstrated that he has suffered a cognizable injury sufficient to satisfy the requirements of Article III. A review of the Record demonstrates that Salu has failed to demonstrate that Direct List is "*his company*[" and that any of the damages alleged in the Complaint are distinct from damages alleged to have been suffered by Direct List. (ECF No. 1 at ¶ 85) (emphasis added).

In addition, the Court reviewed the Damages Report submitted by Plaintiffs. (ECF No. 47-5 at 47-75). Even if the Court assumes that the Report provides some evidence that Direct List suffered an injury, it does not establish that Salu himself suffered an injury. The general allegations in the Complaint relating to Salu's personal injuries are injuries suffered by Direct List, and not by Salu. Therefore, Salu lacks Article III standing to bring fraud and UCL claims against Vistage for injuries suffered by Direct List because Salu has failed to satisfy the injury requirement for Article III standing in federal court. *See Warren*, 328 F.3d at 1140, 1141-45 (granting Rule 12(b)(1) motion to dismiss for lack of standing because the plaintiff failed to demonstrate "that the facts alleged, if proved, would confer standing upon him."). The motion to dismiss the fraud and UCL claims by Salu against Vistage is granted.

ii. Plaintiff Direct List

Direct List alleges that "[i]n reliance on these and many other repeated assurances of confidentiality, Mr. Salu shared confidential information with Mr. Kessler, his Vistage CEO Group Chair" Phil Kessler, and that "the Vistage Defendants, led by CEO

² This review does not transform Vistage's motion to dismiss on standing grounds against Salu into a Rule 56 motion for summary judgment. *See McCarthy*, 850 F.2d at 560; *see also Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983) (holding that a review of the record outside of the pleadings does not turn a motion to dismiss for lack of subject matter jurisdiction "into a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56.").

1 Group Chair Phil Kessler, used Mr. Salu’s confidential information to form a competing
 2 business, AVS Leads.” (ECF No. 1 ¶¶ 7-8). Direct List alleges that “Mr. Salu only
 3 shared this information because of the assurances from the Vistage Defendants that the
 4 information would be held in strictest confidence.” *Id.* at ¶ 7. Direct List alleges that
 5 the confidential information shared by Salu was “regarding the design and operation of
 6 a business that Mr. Salu created called Direct List LLC.” *Id.* The Court of Appeals has
 7 held that such but-for causation makes for a “strong[]” claim that the causation
 8 requirement has been satisfied at the motion to dismiss phase. *Maya v. Centex Corp.*,
 9 658 F.3d 1060, 1070 (9th Cir. 2011). In addition, while “[t]his chain of causation has
 10 more than one link . . . it is not hypothetical or tenuous; nor do[es]” Vistage “challenge
 11 its plausibility.” *Nat’l Audobon Soc’y, Inc. v. Davis*, 307 F.3d 835, 849 (9th Cir. 2002).
 12 Therefore, Direct List has satisfied its burden of demonstrating that it has suffered an
 13 injury in fact to achieve Article III standing.

14 Direct List alleges that a favorable judgment against Vistage would redress the
 15 harm it has suffered because “Defendants have . . . continue[d] to cause substantial and
 16 irreparable damage and injury to Plaintiffs.” (ECF No. 1 at ¶ 102). Vistage contends
 17 that Direct List “does not allege that Vistage is engaged in any conduct that is causing
 18 either Plaintiff any harm” and that “enjoining Vistage from using the Confidential
 19 Information will not redress any potential injury Plaintiffs claim to have suffered.”
 20 (ECF No. 47-1 at 26).

21 To demonstrate that it has satisfied Article III’s redressability requirement for the
 22 purpose of a Rule 12(b)(1) motion, Direct List need only show “that the facts alleged,
 23 if proved, would confer standing upon [it].” *Warren*, 328 F.3d at 1140. This Court has
 24 ruled in a prior order that “[t]he allegations of the Complaint are adequate to infer that
 25 Vistage may be liable for the actions of Kessler under the theory of agency and
 26 ratification.” (ECF No. 20 at 10). Plaintiffs allege that “[l]ed by Phil Kessler and
 27 others, AVS Leads recruited away all of Direct List’s key employees, and poached its
 28 customers, using confidential information of Direct List[,]” and Vistage does not

1 contest that AVS continues to operate to this day. (ECF No. 1 at ¶ 8). Direct List has
 2 sufficiently alleged that the injury it has suffered may be redressed by a judgment in its
 3 favor. The Court finds that the prudential standing principles have been satisfied for
 4 Direct List's UCL claim against Vistage. *See Valley Forge*, 454 U.S. at 474-75
 5 (discussing prudential standing principles). The Court finds that Direct List has met its
 6 burden to establish Article III standing to bring its UCL claim against Vistage.

7 **III. Motion for Summary Judgment on Direct List's UCL Claim Against Vistage**

8 **A. Facts**

9 Salu joined Vistage in 2007 and was a dues paying member until mid-2015.
 10 (ECF No. 53-9 at 2; Salu Decl. at ¶ 3). After moving from North Carolina, Salu joined
 11 a Vistage group in San Diego, California and subsequently selected a group chaired by
 12 Defendant Phil Kessler. (ECF No. 47-1 at 10; Salu Dep. at 148:19-20). While Salu was
 13 a member of this Vistage group, he shared financial information regarding the company
 14 Direct List with the group, including Kessler. (ECF No. 53 at 6, Salu. Dep. at 61:24-
 15 62:11). Salu and Kessler would engage in regular one-on-one meetings on a monthly
 16 basis from May 2011 through early 2015. (Salu Dep. at 147:19-148:16).

17 In May 2015, Salu learned that employees at Direct List had quit and
 18 subsequently joined a new company called AVS Leads. (ECF No. 53-9 at 4; Salu Decl.
 19 at ¶ 10). In his declaration, Salu states that "[b]y September of 2015, Phil Kessler's
 20 company, AVS Leads, had recruited away all of my employees and virtually all of my
 21 customers." *Id.* at ¶ 13. Salu states that during this time, "Phil Kessler had not been
 22 terminated by Vistage or even disciplined." *Id.*

23 Pete Sciabarra, Vice President of Field Operations at Vistage, states that "Vistage
 24 has never done business with AVS, it has no ownership interest in AVS, it does not
 25 profit directly or indirectly from AVS, it has no relationship with AVS, and it does not
 26 compete against AVS." (ECF No. 47-3 at 2, Sciabarra Decl. at ¶ 2). Sciabarra states
 27 that "Vistage was not aware of any conduct alleged by the Plaintiffs
 28 pertaining to Phil Kessler prior to June of 2015[,] and "Vistage's first notice of the

1 subject matter alleged in the lawsuit occurred on June 16, 2015, by which time the
2 company AVS Leads was already formed and operating, and the Direct List workers
3 had already left Direct List and accepted employment at AVS.” *Id.* at ¶ 7. Sciabarra
4 states that “Vistage does not possess, have custody or control of, or use any trade
5 secrets, confidential or proprietary information of Direct List LLC[,] and that “Vistage
6 has no interest in this information whatsoever.” *Id.* at ¶ 3.

7 **B. Contentions of the Parties**

8 Vistage contends “[t]he remedies available” for Direct List’s UCL claim “are
9 narrowly circumscribed by statute to injunctive relief and/or restitution[,]” and that it
10 is entitled to summary judgment on the UCL claim because Direct List does “not allege
11 any conduct of Vistage that must be enjoined, nor seek any Vistage profits to be
12 disgorged[.]” (ECF No. 47-1 at 25). Vistage contends that Direct List seeks injunctive
13 relief “consist[ing] of enjoining the further misuse of the Confidential Information, but
14 [Direct List] never allege[s] that Vistage . . . uses or even possesses it.” *Id.* at 8.
15 Vistage contends that Direct List relies on a “previous and now-outdated version of the”
16 UCL statute that permitted claims brought to prevent harm to the general public, and
17 that the California Supreme Court and the Court of Appeals have since recognized that
18 UCL claims cannot be brought to prevent harm to the general public. (ECF No. 54 at
19 8-9).

20 Direct List contends that the alleged fraud committed by Vistage “has already
21 occurred . . . with respect to Salu, [but] it is not true with respect to all current and
22 future members of Vistage.” (ECF No. 53 at 4). Direct List contends that injunctive
23 relief against Vistage is appropriate because Vistage “has no legitimate reason to
24 continue promising confidentiality to the public and its members” because a Vistage
25 employee stated that the company cannot guarantee confidentiality in a deposition in
26 this matter. *Id.* at 18. Direct List contends that “Vistage continues to tout the
27 confidentiality of its services to this very day,” and therefore “Vistage should be
28 enjoined from making these false promises, so that others do not fall victim to Vistage’s

1 bait-and-switch as Salu did.” *Id.* at 4-5.

2 **C. Standard of Review**

3 Summary judgment is proper when the movant shows that in the record,
4 “including depositions, documents, electronically stored information, affidavits or
5 declarations, stipulations . . . admissions, interrogatory answers, or other materials[,]”
6 there “is no genuine dispute as to any material fact and the movant is entitled to
7 judgment as a matter of law.” Fed. R. Civ. P. 56(a), (c). An issue of fact is “genuine
8 . . . if the evidence is such that a reasonable jury could return a verdict for the
9 nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). An
10 issue of fact is material if it “might affect the outcome of the suit under the governing
11 law.” *Id.* at 248. “The burden of establishing the nonexistence of a ‘genuine issue’ is
12 on the party moving for summary judgment.” *Celotex Corp. v. Cattrett*, 477 U.S. 317,
13 330 (1986). A material fact is one that is relevant to an element of a claim or defense,
14 determined by the substantive law governing the claim or defense. *See Matsushita*
15 *Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986).

16 Once the moving party meets its initial burden, the non-moving party must go
17 beyond the pleadings and, by its own evidence, “set forth specific facts showing that
18 there is a genuine issue for trial.” *Anderson*, 477 U.S. at 250. In order to make this
19 showing, the non-moving party must “identify with reasonable particularity the
20 evidence that precludes summary judgment.” *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th
21 Cir. 1996) (citation omitted). When considering a motion for summary judgment,
22 courts “must assume the nonmoving party’s version of the facts to be correct.” *Liston*
23 *v. Cty. of Riverside*, 120 F.3d 965, 977 (9th Cir. 1997) (citation omitted). If the moving
24 party meets the initial burden, the nonmoving party cannot defeat summary judgment
25 merely by demonstrating “that there is some metaphysical doubt as to the material
26 facts.” *Matsushita*, 475 U.S. at 586; *see also Anderson*, 477 U.S. at 252 (“The mere
27 existence of a scintilla of evidence in support of the [nonmoving party’s] position will
28 be insufficient.”).

1 **D. Analysis**

2 The purpose of the UCL “is to protect both consumers and competitors by
3 promoting fair competition in commercial markets for goods and services.” *Kasky v.*
4 *Nike, Inc.*, 45 P.3d 243, 249 (Cal. 2002). “In service of that purpose, the Legislature
5 framed the UCL’s substantive provisions in broad, sweeping language[.]” *Kwikset*
6 *Corp. v. Superior Court*, 246 P.3d 877, 883 (Cal. 2011). “California’s statutory unfair
7 competition laws broadly prohibit unlawful, unfair, and fraudulent business acts.”
8 *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1151 (9th Cir. 2008).
9 However, “[w]hile the scope of conduct covered by the UCL is broad, the remedies are
10 limited.” *Theme Promotions v. News America Mktg. FSI*, 546 F.3d 991, 1008 (9th Cir.
11 2008).

12 **i. Standing Under the UCL**

13 Two requirements are necessary to satisfy standing under the UCL: “a party must
14 now (1) establish a loss or deprivation of money or property sufficient to qualify as
15 injury in fact, i.e., economic injury, and (2) show that th[e] economic injury was the
16 result of, i.e., caused by, the unfair business practice or false advertising that is the
17 gravamen of the claim.” *Kwikset*, 246 P.3d at 885.

18 The text and history of Proposition 64 suggests that the term “injury in fact” was
19 included because of an “inten[tion] to incorporate the established federal meaning” of
20 “standing under [A]rticle III” of the Constitution. *Id.* In 2004, Proposition 64 limited
21 the ‘injury in fact’ requirement of the UCL to include only economic or monetary
22 injuries; “[t]he plain import of this is that a plaintiff now must demonstrate some form
23 of economic injury.” *Id.*; see also *Animal Legal Defense Fund v. Mendes*, 72 Cal. Rptr.
24 3d 553, 560 (Cal. Ct. App. 2008) (finding that the UCL “discloses a clear requirement
25 that injury must be economic, at least in part, for a plaintiff to have standing under
26
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1 Business and Professions Code section 17204.”).³

2 *Kwikset* found that inquiries for standing and for damages under the UCL “are
3 wholly distinct” because requiring UCL standing to be “dependent on eligibility for”
4 relief “would turn the remedial scheme of the UCL on its head.” 246 P.3d at 894-95.
5 Therefore, in order to satisfy standing under the UCL, “a plaintiff need not allege that
6 he or she was entitled to restitutionary relief, but need only allege that he or she suffered
7 an injury in fact, caused by the defendant.” *Law Offices of Mathew Higbee v. Exp.*
8 *Assistance Servs.*, 153 Cal. Rptr. 3d. 865, 875 (Cal. Ct. App. 2013).

9 The second factor for standing under the UCL “requires that a plaintiff’s
10 economic injury come ‘as a result of’ the unfair competition . . . [t]he phrase ‘as a result
11 of’ in its plain and ordinary sense means ‘caused by’ and requires a showing of a causal
12 connection or reliance on the alleged misrepresentation.” *Kwikset*, 246 P.3d at 887
13 (citation omitted). In order to satisfy the causal requirement, “a plaintiff must
14 demonstrate some causal nexus between the unlawful or deceptive act and damages
15 incurred by the plaintiff[.]” *Rahman v. Mott’s LLP*, No. CV 13-3482 SI, 2014 WL
16 5282106, at *5 (N.D. Cal. Oct. 15, 2014).

17 Direct List alleges “substantial and irreparable damage and injury” resulting from
18 the allegedly unfair conduct under the UCL statute. (ECF No. 1 at ¶¶ 101, 102).
19 Plaintiffs submitted an Expert Report, and it is undisputed that this Report was
20 prepared to address “the damages Plaintiffs suffered in this dispute” – including
21 damages allegedly suffered by Direct List. (ECF No. 54-3 at 6). The parties do not
22 dispute that this Report “represents all of the damages [the expert] concludes that all of
23

24 ³ Prior to 2004, “any person could assert a[n unfair competition] claim on behalf
25 of the general public regardless of whether they suffered an actual injury.” *Lozano v.*
26 *AT&T Wireless Services, Inc.*, 504 F.3d 718, 731 (9th Cir. 2007). In 2004, California
27 voters approved Proposition 64 which eliminated standing based on a claim brought on
28 behalf of the general public. *Kwikset*, 246 P.3d at 884. “The intent of this change was
to confine standing to those actually injured by a defendant’s business practices and to
curtail the prior practice of filing suits on behalf of ‘clients who have not used the
defendant’s product or service . . . or had any other business dealing with the defendant
. . .’” *Id.* at 884 (quoting *Californians for Disability Rights v. Mervyn’s LLC*, 138 P.3d
207, 209 (Cal. 2006)).

1 the Plaintiffs have suffered.” *Id.* at 7. Vistage contends in its response to Plaintiffs’
2 Assertion of Genuinely Disputed Facts that the expert “calculate[d] damages as the
3 diminution in value of Direct List.” *Id.* at 10-11.

4 The Report determined that the damages in this case total “\$5,300,000 rounded.”
5 (Damages Report at 1, ECF No. 47-5 at 50). The Report determined that lost sales
6 based on AVS Leads’ “direct competition using the allegedly misappropriated Direct
7 List confidential information” resulted in lost profits in 2014 and 2015. (Damages
8 Report at 10, ECF No. 47-5 at 59). The Report states that its “underlying numbers are
9 reliable” because of a “parallelism” resulting from a finding that “AVS Lead’s [sic]
10 revenue of \$500 thousand [is] approximately the same as Direct List lost sales of \$545
11 thousand (2014 v. 2015).” (Damages Report at 7, ECF No. 47-5 at 56).

12 Direct List has come forward with some evidence that it suffered economic injury
13 in this matter. The UCL economic injury requirement is satisfied with a showing of
14 “sales, revenue, market share, and asset value.” *Allergan, Inc. v. Athena Cosmetics,*
15 *Inc.*, 640 F.3d 1377, 1382 (Fed. Cir. 2011) (quotation marks omitted). The Court does
16 not rule on the admissibility of the Damages Report. For the purpose of establishing
17 standing at this stage of the proceedings, the Court accepts the Report as some evidence
18 of economic injury sufficient to demonstrate standing under the UCL.

19 In Salu’s declaration submitted by Plaintiffs, Salu states that “[b]y September of
20 2015, Phil Kessler’s company, AVS Leads, had recruited away all of” Direct Lists
21 employees. (ECF No. 53-9 at 6, Salu Decl. at ¶ 13). Salu states that at this time, “Phil
22 Kessler had not been terminated by Vistage or even disciplined.” *Id.* This Court has
23 ruled in a prior order that “The allegations of the Complaint are adequate to infer that
24 Vistage may be liable for the actions of Kessler under the theory of agency and
25 ratification.” (ECF No. 20 at 9-10). Direct List has come forward with some evidence
26 that the economic injury it suffered in this matter was caused by Vistage, as Kessler was
27 employed by Vistage at the time that Direct List employees left to work at AVS Leads
28 and Direct List began to suffer economic injury. Direct List has come forth with some

1 evidence of UCL causation sufficient to demonstrate standing under the UCL.
 2 Therefore, the Court finds that Direct List has standing under the UCL statute to bring
 3 its claim against Vistage.

4 **ii. Remedies Under the UCL**

5 “A UCL action is equitable in nature; damages cannot be recovered.” *Korea*
 6 *Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 943 (Cal. 2003). Under the UCL,
 7 “[p]revailing plaintiffs are generally limited to injunctive relief and restitution.” *Cal-*
 8 *Tech Comms., Inc. v. Los Angeles Cellular Tel. Co.*, 973 P.2d 527, 539 (Cal. 1999).
 9 The statute only provides for relief that is

10 necessary to prevent the use or employment by any person of any practice
 11 which constitutes unfair competition, as defined in this chapter, or as may
 12 be necessary to restore to any person in interest any money or property,
 real or personal, which may have been acquired by means of such unfair
 competition.

13 Cal. Bus. & Prof. Code § 17203; *see also Clark v. Superior Court*, 235 P.3d 171, 174
 14 (Cal. 2010) (holding that “[i]n a private unfair competition law action, the remedies are
 15 generally limited to injunctive relief and restitution” and that “damages, including
 16 punitive damages and increased or enhanced damages” are “[n]ot recoverable”)
 17 (citation omitted). The UCL provides only for “limited remedies[.]” *Cal-Tech Comms.*,
 18 973 P.2d at 539. Under section 17203, a “court cannot . . . award whatever form of
 19 monetary relief it believes might deter unfair practices.” *Korea Supply Co.*, 63 P.3d at
 20 946. When considering whether to grant equitable relief under the UCL, “the right to
 21 seek injunctive relief under section 17203 is not dependent on the right to seek
 22 restitution; the two are wholly independent remedies.” *Clayworth v. Pfizer, Inc.*, 233
 23 P.3d 1066, 1088 (Cal. 2010). However, the Legislature did not “intend[] to authorize
 24 a court to order a defendant to disgorge all profits to a plaintiff who does not have an
 25 ownership interest in those profits.” *Korea Supply*, 63 P.3d at 946.

26 In the Complaint, Direct List seeks an order that Vistage disgorge its profits
 27 earned from the confidential information, and that Defendants be “enjoined” from
 28 “continu[ing] to carry out [] unlawful conduct[.]” (ECF No. 1 at ¶¶ 102, 104). Direct

1 List admits that any injunction issued by this Court would not be able to provide relief
2 to Salu or Direct List, but instead contends that relief is necessary such that Vistage
3 does not “continue promising confidentiality to the public[.]” (ECF No. 53 at 18).

4 Proposition 64 eliminated the right for a private citizen to sue under the UCL to
5 prevent harm to the general public. *See Lozano*, 504 F.3d at 731 (finding that
6 Proposition 64 “eliminated private attorney general standing for UCL claims.”)
7 Plaintiffs’ sole claim for injunctive relief is based upon preventing future harm to the
8 public, which Proposition 64 specifically eliminated. Direct List does not come forward
9 with facts demonstrating that Vistage currently possesses any of Direct List’s
10 confidential information, nor does Direct List demonstrate any ongoing conduct by
11 Vistage that can be cured by injunctive relief – other than general harm suffered by the
12 public and other current Vistage members. (ECF No. 53 at 4). The Court finds that
13 Direct List has failed to come forward with facts to support that it would be entitled to
14 injunctive relief under the UCL.

15 Additionally, Direct List has failed to come forward with facts to demonstrate
16 that an order for restitution or disgorgement of profits from Vistage will remedy its
17 harm. Direct List has not set forth specific facts to contest the declaration of Sciabarra,
18 who states that Vistage does not possess, nor have any interest in, any confidential
19 information regarding Direct List’s business practices. Further, Sciabarra states that
20 “Vistage does not compete with Direct List LLC in any manner” and that “Vistage and
21 Direct List operate entirely different businesses.” (ECF No. 47-3 at 2, Sciabarra Decl.
22 at ¶ 3-4). *See Saldate v. Wilshire Credit Corp.*, 686 F. Supp. 2d 1051, 1067 (E.D. Cal.
23 2010) (dismissing UCL claim because “[t]he complaint lacks allegations of ongoing
24 wrongful business conduct or a pattern of such conduct.”).

25 Direct List does not come forward with facts to demonstrate that Direct List has
26 “an ownership interest in [AVS Leads’] profits” such that awarding restitution for
27 Direct List against Vistage would be “permitted under the UCL.” *Korea Supply*, 63
28 P.3d at 947-48. Under the limited remedies provided by the UCL, “an individual may

1 recover profits unfairly obtained to the extent that these profits represent monies given
2 to the defendant or benefits in which the plaintiff has an ownership interest.” *Id.* at 947.
3 Direct List has not come forward with any facts to demonstrate that any profits
4 allegedly gained by AVS Leads were “given to” Vistage. *Id.* In awarding restitution
5 under the UCL, the Court is permitted only to “restore the status quo by returning to the
6 plaintiff funds in which he or she has an ownership interest[,]” and there are no facts
7 to show that Direct List is entitled to recovery. *Id.* As Direct List has failed to
8 demonstrate a genuine dispute of material fact as to whether it is entitled to either of the
9 two remedies “allowed under the UCL[,]” the Court grants Vistage’s motion for
10 summary judgment on the UCL claim brought by Direct List. *Theme Promotions*, 546
11 F.3d at 1009.

12 **IV. Conclusion**

13 IT IS HEREBY ORDERED that Vistage’s Motion for Summary Judgment, or
14 in the Alternative Dismissal, of Plaintiffs’ Fraud and Cal. Bus. & Prof. Code § 17200
15 Claims (ECF No. 47) is **GRANTED**.

16 DATED: November 3, 2016

17 
18 **WILLIAM Q. HAYES**
United States District Judge